Supreme Court, U.S.
FILED
FEB 7 2000
CLERK

(2)

No. 99-1269

In The

Supreme Court of the United States

TIMOTHY MADAI TAYLOR,

Petitioner,

v.

STATE OF IOWA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS J. MILLER
Attorney General of Iowa

GORDON E. ALLEN*
Deputy Attorney General
Hoover State Office Building
Des Moines, IA 50319
(515) 281-5166

Attorneys for Respondent State of Iowa
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

11 PD

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER AMENDMENTS TO FEDERAL LAW ARE BINDING ON QUESTIONS OF STATE LAW WHEN THERE IS NO FEDERAL QUESTION PRESENT?

II. SPECIFICALLY, IS AN ANALYSIS BY STATE COURTS OF THE STATE LAW DEFINITION OF DISPARATE TREATMENT AND DISPARATE IMPACT AFFECTED BY AN AMENDMENT TO A FEDERAL STATUTE?

TABLE OF CONTENTS

Page

Counter-Statement of Questions Presented for Review i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Summary of the Argument 2

Reasons for Denying the Writ 2

1. There is no federal question presented as required by Rule 10(c). Iowa's courts interpreted state law only 2

2. The Disparate Impact claim was appropriately dismissed, under the facts found by the trial court 4

3. The Disparate Treatment claim was appropriately dismissed, under the facts found by the trial court 5

4. Petitioner failed to preserve error on his disparate treatment claim 6

Conclusion 6

TABLE OF AUTHORITIES

Page

CASES:

Cassady v. Wheeler, 224 N.W.2d 649 (Iowa 1974) 3

Dubuque City Assessor's Office v. Dubuque Human Rights Comm., 484 N.W.2d 200 (Iowa Ct. App. 1992) 4, 5

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 4

Hubbard v. State, 163 N.W.2d 904 (Iowa 1969) 3

Hubby v. State, 331 N.W.2d 690 (Iowa 1993) 6

HyVee Food Stores v. Civil Rights Comm'n, 453 N.W.2d 512 (Iowa 1990) 4, 5

Iowa Civil Rights Comm. v. Woodbury County Community Action Agency, 304 N.W.2d 443 (Iowa Ct. App. 1981) 4

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 4

Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986) 3

Mowry v. Iowa Civil Rights Commission, 424 N.W.2d 764 (Iowa Ct. App. 1988) 5

Pearson v. Robinson, 318 N.W.2d 188 (Iowa 1982) 3

Rains v. Criterion Sys., Inc., 80 F.3d 339 (9th Cir. 1996) 3

State Farm Mut. Auto Ins. Co. v. Pfibben, 350 N.W.2d 202 (Iowa 1984) 6

Ward's Cove Packing Co. v. Antonio, 490 U.S. 642 (1989) 2, 4, 5

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

42 U.S.C. § 2000e (1991) 1

Iowa Code § 216.6 (1993) 2, 3

STATEMENT OF THE CASE

In 1993, Taylor, a 42-year-old African American, was unsuccessful on four different attempts to secure various positions with the Second Judicial District Department of Correctional Services of Iowa (Department). Taylor was one applicant for a position as a PPOII (Probation and Parole Officer, level II) out of 161 other candidates in April of 1993, and was not chosen as one of the top five to be interviewed for the position. In August of 1993, Taylor then applied for a position as a PPOIII and was interviewed, but not hired. Again in September, 1993, Taylor applied for a PPOII position, was interviewed, and not hired. In October of 1993, Taylor also applied for a position as an RA (Residential Advisor), but failed to complete the application process. The State conceded that Taylor was qualified for all four positions, but asserted that more qualified candidates were hired for the three PPO positions and his failure to complete the RA application prevented his consideration.

Taylor alleged both disparate treatment and disparate impact claims based *only* on Iowa Code § 216.6 (1993), Iowa's state law analogue to Title VII (42 U.S.C. § 2000e et seq.) He did not allege Title VII violations. (Petitioner's Appendix 2a) Legitimate, non-discriminatory reasons offered by the Department (the hiring of more qualified candidates) led the trial court to dismiss the disparate treatment claim. The absence of a causal relationship between the challenged employment decisions and the alleged statistical disparities in the Department's workforce led the trial court to dismiss the

disparate impact claim. The dismissals were affirmed at the state appellate and Supreme Court level.

SUMMARY OF THE ARGUMENT

The Iowa District Court, the Iowa Court of Appeals, and the Iowa Supreme Court interpreted the state Civil Rights Act (Iowa Code chapter 216) and determined that Taylor could not recover on his claim, alleging discrimination on account of his race. Federal analysis of Title VII and the 1991 Amendments to that Title, is unnecessary because there was no Title VII claim made. Even if the 1991 amendment to Title VII overrules *Ward's Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), by shifting both the burden of production and the burden of proof to the employer to show that a challenged employment practice is job related and consistent with business necessity, the amendment applied only to the federal Title VII.

REASONS FOR DENYING THE WRIT

I. THERE IS NO FEDERAL QUESTION PRESENTED AS REQUIRED BY RULE 10(c). IOWA'S COURTS INTERPRETED STATE LAW ONLY.

The Iowa Supreme Court correctly affirmed the lower courts' acceptance of the state's business justification under *Ward's Cove*, without reference to the 1991 Amendments to Title VII. Although the Supreme Court of Iowa gives "federal decisions deference and consideration, absent federal constitutional issues, the Supreme Court of

Iowa has the final say in interpreting Iowa statutes." *Pearson v. Robinson*, 318 N.W.2d 188 (Iowa 1982). The Iowa Supreme Court again followed *Hubbard v. State*, 163 N.W.2d 904, 909 (Iowa 1969): "Although decisions and interpretations of federal courts may be illustrative to state courts construing statutes patterned after those enacted by Congress and are entitled to great weight, they are neither conclusive *nor compulsory*". (emphasis added) "When there is no federal question involved, the Supreme Court of Iowa has the final say." *Cassady v. Wheeler*, 224 N.W.2d 649, 652 (Iowa 1974). "The mere reference to a federal statute in a pleading will not convert a state law claim into a federal cause of action if the federal statute is not a necessary element of the state law claim, and no preemption exists." *Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 345-47 (9th Cir. 1996). "Jurisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 809 n. 6, 106 S.Ct. 3229, 3233 n. 6, 92 L.Ed.2d 650 (1986).

Taylor based his discrimination claims on Iowa Code chapter 216, Iowa's Civil Rights statute. The Iowa Supreme Court may, and often does, consider federal law when interpreting a state statute, but has no obligation to do so. The 1991 Amendments are not controlling on the interpretation of state law.

II. THE DISPARATE IMPACT CLAIM WAS APPROPRIATELY DISMISSED, UNDER THE FACTS FOUND BY THE TRIAL COURT.

In Iowa, "[a] plaintiff in a civil rights action has the burden of establishing a prima facie case of discrimination." *Iowa Civil Rights Comm. v. Woodbury County Community Action* Agency, 304 N.W.2d 443, 448 (Iowa Ct. App. 1981). "Discrimination may be shown by either disparate impact or disparate treatment." *Id.* "The standards for disparate treatment claims are based on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), while the standards for disparate impact claims stem from *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971)." *Id.* at 443. These principles as to allocation of the order of presentation and burden of proof were followed here as well. (Petitioner's App. 5a, 7a)

In Iowa, the first stage of a disparate impact claim requires the employee show that a particular employment practice has an adverse impact on a protected group in "marked disproportion to its impact on employees outside the group." *HyVee Food Stores v. Civil Rights Comm'n*, 453 N.W.2d 512, 517 (Iowa 1990). "The statistical comparison must be valid in terms of significance, scope and time." *Id.* The petitioner is then "responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." *Dubuque City Assessor's Office v. Dubuque Human Rights Comm.*, 484 N.W.2d 200, 203 (Iowa Ct. App. 1992), quoting *Ward's Cove*, 490 U.S. at 656. In Iowa, "[T]he burden of persuasion in a disparate impact case now rests with the employee in all three stages of proof." *HyVee*, at

518-19. This analytical framework was reaffirmed here. (Petitioner's Appendix 6a.)

Under the *Ward's Cove* analysis, the sole burden on the Department was the burden of production. Trial court found that was successfully met. Under the facts found by the trial court the claims were properly dismissed.

III. THE DISPARATE TREATMENT CLAIM WAS APPROPRIATELY DISMISSED, UNDER THE FACTS FOUND BY THE TRIAL COURT.

"Disparate treatment occurs where members of a majority have been denied the same employment, promotion, or transfer opportunities as have been made available to other employees." *Mowry v. Iowa Civil Rights Commission*, 424 N.W.2d 764 (Iowa Ct. App. 1988). "The disparate treatment theory focuses on the employer's motivation." *HyVee*, at 516. "In a claim of disparate treatment in employment, proof of the employer's motive is critical." *Id.* In a disparate treatment claim the employee seeks to show individual discrimination on the basis of race, color, religion, sex or national origin. *Id.* "The employee must establish a prima facie case of intentional discrimination by a preponderance of the evidence." *Dubuque City Assessor's Office v. Dubuque Human Rights Commission*, 484 N.W.2d 200, 202 (Iowa Ct. App. 1992).

Even though Taylor has presented a prima facie case, the district court concluded, "rejection of the plaintiff for the PPO positions was based on a legitimate, non-discriminatory reason." (Petitioner's Appendix 8a) The Department hired "more qualified applicants" and the trial court reviewing those qualifications, "agreed".

IV. PETITIONER FAILED TO PRESERVE ERROR IN HIS DISPARATE TREATMENT CLAIM.

"Issues must ordinarily be presented to and passed upon by trial court before they may be raised and decided on appeal." *State Farm Mut. Auto Ins. Co. v. Pfibben*, 350 N.W.2d 202, 206 (Iowa 1984). "If no Rule 179(b) motion (post-trial) is made, or an issue not raised, the court will assume as fact an unstated finding necessary to support the trial court's judgment." *Hubby v. State*, 331 N.W.2d 690, 695 (Iowa 1993) (parenthetical added).

If Taylor felt there was any error in the analysis of his disparate treatment claim, it was his obligation to raise it before the district court. Taylor's failure to do so resulted in a failure to preserve the error under state law making it non-justiciable on review. (Petitioner's Appendix 8a)

CONCLUSION

For the reasons set forth, the Petition should be denied.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

GORDON E. ALLEN
Deputy Attorney General*
Hoover Building
Des Moines, IA 50319
(515) 281-5166
FAX (515) 281-4209
**Counsel of Record*